83-179

Office - Supreme Court, U.S.
FILED
AUG 2 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD R. POSEY,

Petitioner,

vs.

SKYLINE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN J. GAYDOS
442 Communicana Building
421 South Second Street
Elkhart, Indiana 46516
(219) 294-1516

Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

This is a wrongful discharge action based on violation of the Age Discrimination in Employment Act, Title 29, Sec. 629 *et seq.*, and the question presented by the Petition is whether summary judgment is appropriate, where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility.[1]

Specifically, the question may be stated as follows:

> Whether it is improper for a Court in a summary judgment proceeding to rule on the credibility of individuals submitting affidavits instead of giving the non-moving party the benefit of all inferences reasonably deducible from the evidence.[2]

---

[1] Federal Rules of Civil Procedure, Rule 56, Notes of Advisory Committee on Rules, 1963 amendment, Subdivision (e).

[2] Dissent by Circuit Judge Cudahy in the Court of Appeals decision, Appendix A, page A-8.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINIONS OF THE COURTS BELOW	2
JURISDICTION	2
THE STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASON FOR GRANTING THE WRIT	6
ARGUMENT	7
CONCLUSION	13
APPENDICES:	
A—Opinion Of The United States Court Of Appeals For The Seventh Circuit	A-1
B—Order Of Court Of Appeals Denying Petition For Rehearing	B-1
C—Memorandum Opinion Of United States District Court For The Northern District Of Indiana, South Bend Division (Honorable Allen Sharp, District Judge)	C-1

LIST OF AUTHORITIES CITED

Cases

Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)	5, 12
Associated Hardware Supply Co. v. Big Wheel Distributing Co., 355 Fed.2d 114, (3rd Cir. 1965), 17 ALR 3d 998	9

Brogen v. Hudson County News Co., 278 Fed.2d 615, 618 (3rd Cir. 1960) 12
Cross v. U.S., 336 Fed.2d 431 (2nd Cir. 1969) 12
Fli-Back Co., Inc. v. Philadelphia Manufacturer's Mutual Insurance Co., 502 Fed.2d 214, (4th Cir. 1974) 9
Gatling v. Atlantic Richfield Co., 577 Fed.2d 185, 187-188 (2nd Cir. 1978) cert. denied 439 U.S. 868, 99 S.Ct. 181, 58 L.Ed.2d 169 (1979) 10
In re Yard Processing Patent Validity Litigation, 498 F.2d 271 (5th Cir. 1974), certiorari denied 95 S.Ct. 640, 419 U.S. 1057, 42 L.Ed.2d 654 12
John Hopkins University v. Hutton, 422 F.2d 1124, 1129 (4th Cir. 1970) 11, 12
Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980) 10
Stevens v. Bernard, 512 Fed. 2d 876, (10th Cir. 1975) 9
United States v. Diebold (1962), 369 U.S. 654, 655, 825 S.Ct. 993, 8 L.Ed.2d 176 ..... 6, 11

Other Authorities

Federal Rules of Civil Procedure, Rule 56(e) Summary Judgment 3

Statutes

29 U.S.C. Section 626(d) 3
29 U.S.C. Section 627 3
29 U.S.C. Section 629 i

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD R. POSEY,

Petitioner,

vs.

SKYLINE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Edward R. Posey prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in the case entitled Edward R. Posey (Plaintiff-Appellant) v. Skyline Corporation (Defendant-Appellee),[3] Appeal No. 81-1580.

Posey brought suit against Skyline, his former employer, on October 10, 1980, for an alleged wrongful discharge in violation of the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 *et seq.* after he was injured on September 5, 1978.

---

[3] Hereafter "Posey" and "Skyline".

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals concerning the wrongful discharge of Posey by Skyline was decided March 8, 1983. The decision is reported at 702 F.2d 102, and a copy of the slip opinion is hereto appended as Appendix A.

The Court denied the Petition for Rehearing by your Petitioner in an unpublished order dated May 4, 1983, a copy being attached hereto and appended as Appendix B.

The lower Court decision in the District Court for the Northern District of Indiana, South Bend Division, involving the wrongful discharge of Posey was not published, and a copy is hereto appended as Appendix C.

JURISDICTION

Jurisdiction of the Court is invoked under Title 28, U.S.C. Section 1254(1).

This Petition is filed within the ninety (90) days' period permitted under Title 28 U.S.C. Section 2101(c), from the order of the Court of Appeals on Petition for Rehearing dated May 4, 1983 (Appendix B).

THE STATUTES INVOLVED

29 U.S.C. Section 626(d)[4]

The relevant portion of Section 626(d) states:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; or—

29 U.S.C. Section 627

The relevant portion of Section 627 states:

> Every employer . . . shall post and keep posted . . . upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

Federal Rules of Civil Procedure
Rule 56(e) Summary Judgment

The relevant portion of Rule 56(e) reads:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

---

[4] 1978 Amendment—Public Law 95-526.

STATEMENT OF THE CASE

Posey filed his complaint alleging that he was willfully and discriminatorily discharged on October 13, 1978, by Skyline and not notified of such discharge for more than six months thereafter.[5]

Skyline after answering the complaint filed a motion for summary judgment with a supporting memorandum and proposed finding of fact and judgment of the court. Skyline in support of the motion submitted two supporting affidavits of Robert F. Szrom and Delvin D. Herr respectively a vice-president and divisional manager of Skyline. The affidavit of Herr avers to personal knowledge as to posting but the Szrom affidavit fails to state that he actually visited the Goshen plant and saw that the ADEA notice was posted.

In opposition to Skyline's motion for summary judgment, Posey submitted a brief and counter-affidavit, the pertinent portions thereof stating:

> 16. That he frequently, i.e., almost every working day, glanced at the posters on the bulletin board in the employees' lunch room adjacent to the plant's production area of the Goshen plant where he was plant manager prior to September 5, 1978, and promptly read any new posted notices, and that he never saw and does not recall ever reading a notice to employees of their rights under the Age Discrimination in Employment Act as stated in the affidavits of Robert F. Szrom and Delvin D. Herr.

---

[5] Posey's complaint, paragraph 7.

The District Court granted summary judgment against Posey on grounds Posey failed to comply with the one hundred eighty (180) day notice requirement of Section 626(d), and adopted in substance the memorandum and the proposed findings of fact and judgment of the court submitted by Skyline.

An appeal to the Court of Appeals was taken on the grounds that Posey timely filed a charge alleging unlawful discrimination with the EEOC as required by Section 626(d). In the appeal the Court of Appeals below affirmed the order and judgment of the District Court. In its decision the Court of Appeals stated:

> Applying the previously discussed principles of summary judgment, we must conclude that Posey's statement is insufficient to create a question of fact concerning whether Skyline had conspicuously posted the ADEA notice. The affidavits submitted by Skyline Corporation uncontrovertedly indicate that the company did indeed conspicuously post the requisite notice. Posey's affidavit merely indicates that Posey never saw the ADEA notice, which is not the same as an averment that the notice was not in fact conspicuously posted. This is no doubt a very close distinction, but it is one we must draw, especially in light of the strict requirements of Rule 56 of the Federal Rules of Civil Procedure. Although it is true that a court should give to the party opposing a summary judgment motion the benefit of all reasonably drawn inferences, see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), the mere possibility that a factual dispute may exist, without more, is an insufficient basis upon which to justify denial of a motion for summary judgment. See *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). Posey's affidavit perhaps at best hints that a question of fact may exist in this case.

The question presented by the present Petition involves whether there should be a change in the standard applied in giving the benefit to the non-moving party of all inferences reasonably deducible from the evidence. The Court of Appeals in its decision concluded that Szrom and Herr are more credible than Posey.

Your Petitioner respectfully submits that it was improper for the Court of Appeals to make such a determination as to credibility on summary judgment.

REASONS FOR GRANTING THE WRIT

In *United States v. Diebold* (1962) 369 U.S. 654, 655, 825 S.Ct. 993, 8 L.Ed.2d 176, this Court held that summary judgment based on certain inferences of fact was improper where contrary factual inferences are permissible.

In view of the decision by the Court of Appeals below, there now arises a question of whether a new standard regarding summary judgment procedure should be applied even though contrary factual inferences are permissible. A study of the affidavits in the present case reveals that there is a genuine issue as to ultimate facts and that it was improper for the Court of Appeals below to determine credibility of the affiants.

It is believed that this question should be clarified by this Court, otherwise a new standard for granting summary judgments will be relied upon which is contrary to the *Diebold* decision.

ARGUMENT

The decision by the Court of Appeals below, pertinent to the question presented by this Petition appears in the Court's decision in Section II, comprising Appendix pages A-5 to A-8 directed to the affidavits submitted by the parties.

The Court of Appeals had no factual basis for stating (Appendix, page A-5) that:

> ". . . Skyline Corporation submitted two affidavits to the district court, both averring that Skyline had in fact conspicuously posted the required ADEA notice of rights."

and (Appendix, page A-6) that:

> "The affidavits submitted by Skyline Corporation *uncontrovertedly indicate* that the company did indeed conspicuously post the requisite notice." (emphasis added)

A portion of the affidavit of Robert F. Szrom states:

> 3. I make this affidavit based upon my personal knowledge or from the business records of Skyline, compiled in the regular course of its business and of which I am custodian.
>
> 4. Included in my responsibilities as Vice President of Human Resources are the making of periodic, unannounced visits to the corporation's facilities, including the Goshen plant at which Mr. Posey was employed until September 16, 1978, in order to ascertain that the operations in such facilities comply with applicable Federal, State and local requirements including the posting of notices required under the Age Discrimination in Employment Act.

Although paragraph 4 of the Szrom affidavit states that one of his responsibilities was the making of periodic, unannounced visits to the Goshen plant where Posey was employed, Szrom fails to state that he actually visited the Goshen plant and saw that the ADEA notice was posted.

Except for the Herr affidavit indicating that the ADEA notice was conspicuously and continuously posted, unexplained gaps appear in the affidavit. Skyline is silent as to who posted the ADEA notices and when the notices were first posted in the lunch room of the Skyline plant.

In response to the affidavits of Herr and Szrom submitted by Skyline relating to the ADEA notice, Posey averred:

> 16. That he frequently, i.e., almost every working day, glanced at the posters on the bulletin board in the employees' lunch room adjacent to the plant's production area of the Goshen plant where he was plant manager prior to September 5, 1978, and promptly read any new posted notices, and that he never saw and does not recall ever reading a notice to employees of their rights under the Age Discrimination in Employment Act as stated in the affidavits of Robert F. Szrom and Delvin D. Herr.

The Court of Appeals (Appendix, pages A-6, A-7) proceeds to summarize the above averment of Posey by stating:

> "Posey's affidavit *merely indicates that Posey never saw the ADEA notice*, which is not the same as an averment that the notice was not in fact conspicuously posted." (emphasis added)

Your Petitioner respectfully submits that such summary is inaccurate and not complete. An accurate and true summary statement of Posey's affidavit is:

> Posey's affidavit clearly indicates that Posey *never saw* nor ever read *an ADEA notice as stated in the affidavits of Robert F. Szrom and Delvin D. Herr.* (emphasis added)

Herr states in his affidavit that the ADEA notice was conspicuously and continuously posted in the lunch room, therefore, in order for the phrase "as stated in the affidavits of" to have proper meaning in Posey's affidavit, Posey's affidavit must be construed as stating that Posey never saw an ADEA notice conspicuously and continuously posted in the employees' lunch room.

When ruling on a motion for summary judgment a Court should not draw factual inferences in favor of the movant and should not resolve a genuine issue of credibility and should remember that the movant has the burden of demonstrating clearly the absence of any genuine material fact. *Associated Hardware Supply Co. v. Big Wheel Distributing Co.*, 355 Fed.2d 114 (3rd Cir. 1965), 17 ALR 3d 998.

Summary judgment is inappropriate if material facts and permissible inference are in genuine dispute. *Fli-Back Co., Inc. v. Philadelphia Manufacturer's Mutual Insurance Co.*, 502 Fed.2d 214, (4th Cir. 1974).

If an inference can be deduced from the facts whereby the non-movant might recover, summary judgment is inappropriate. *Stevens v. Bernard*, 512 Fed.2d 876, (10th Cir. 1975).

The Court of Appeals (Appendix, page A-7) states that Posey failed to aver "that the notice was not in fact conspicuously posted." Posey submits that if the relevant portion of the Posey affidavit is properly read in its entirety, that this Court will conclude that Posey averred

that the ADEA notice was not conspicuously posted in the lunch room of the Skyline plant.

The Court of Appeals (Appendix, page A-7) then states:

> "the mere possibility that an actual dispute may exist is insufficient to justify denial of a motion for summary judgment." See *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980).

But in *Quinn* the United States Court of Appeals, Second Circuit, held at page 442:

> "that the district court granted summary judgment prematurely and denied plaintiff a meaningful opportunity to prove that his liberty interest has been unlawfully infringed."

Further in *Quinn*, the Second Circuit at page 444 concluded that summary judgment was not warranted on the record before them. The Second Circuit not being unmindful that summary judgment is a useful device stated on page 445 of *Quinn*:

> "Thus the mere possibility that a factual dispute may exist without more, is not sufficient to overcome a convincing presentation by the moving party." See *Gatling v. Atlantic Richfield Co.*, 577 Fed.2d 185, 187-188 (2nd Cir. 1978) cert. denied 439 U.S. 868, 99 S.Ct. 181, 58 L.Ed.2d 169 (1979).

In *Gatling*, the Second Circuit Court of Appeals held that mere facts that prospectors were black and that mining company refused to exercise option to acquire prospector's tentative prospects and terminated agreement, without more, were insufficient to preclude summary judgment in favor of mining company with respect to prosecutors civil rights claim that option was terminated because of mining company's discovery that prospectors were Negroes.

The facts in this case are completely different from the facts in the *Gatling* case. The averment made by Posey in the Posey affidavit is much more than a "mere possibility". Posey's averment is a material fact in direct conflict with the affidavits of Herr and Szrom. Therefore, in the decision of the Court of Appeals below, Judge Cudahy is correct in his dissent in stating:

> "I cannot agree that Posey's affidavit fails to state specific facts . . . The majority is applying a rigid common-law pleading approach to summary judgment practice which seems to me manifestly inconsistent with the spirit of the Federal Rules.
>
> Posey 'should be given the benefit of all inferences reasonably deducible from the evidence.' *Federal Procedure*, L.Ed. Sec. 62:546 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Here the majority is simply determining that Szrom and Herr are more credible than Posey. This is a determination which we are not at liberty to make on summary judgment. See *Federal Procedure*, Sec. 62:547. Further, discovery might eliminate the issue of fact as to posting of the notice without need for trial. However, I do not believe we are free to take impermissible liberties with these quite conflicting affidavits as a short cut to disposition of this case."

For the purposes of the motion, non-movant's version of the facts must be accepted and all disputed matters must be resolved in his favor. *United States v. Diebold* (1962) 369 U.S. 654, 655, 825 S.Ct. 993, 8 L.Ed.2d 176. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. *Id.*

Summary judgment is proper only if reasonable minds cannot differ on the questions of materiality. *John*

Hopkins University v. Hutton, 422 F.2d 1124, 1129 (4th Cir. 1970).

Where reasonable men might draw different inferences even from same established facts, issue should be resolved by fact finder after full hearing of all evidence rather than by summary judgment. *In re Yarn Processing Patent Validity Litigation*, 498 F.2d 271 (5th Cir. 1974), certiorari denied 95 S.Ct. 640, 419 U.S. 1057, 42 L.Ed.2d 654.

A judge may not, on motion for summary judgment, draw fact inferences. . . . Such inferences may be drawn only on a trial. *Brogen v. Hudson County News Co.*, 278 F.2d 615, 618 (3rd Cir. 1960) cited in *Cross v. U.S.*, 336 Fed.2d 431 (2nd Cir. 1969). On remand, 250 Fed.Supp. 609. No summary judgment should be granted where, as here, the disputed questions of fact turn exclusively on the credibility of movants' witnesses. *Cross*, supra.

As this Court stated in the *Adickes* case:

> "The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases."

Your Petitioner respectfully submits that there is a dispute as to a material fact as to posting of an ADEA notice and that a genuine issue exists in this case. Posey's affidavit clearly and unequivocally contradicts the averments of the Herr affidavit by stating that Posey never saw a notice to employees as stated in the affidavits of Szrom and Herr, in other words, that Posey never saw an ADEA notice conspicuously and continuously posted in the employees' lunch room of the Skyline plant where Posey worked.

Your Petitioner's complaint[6] also states that Skyline did not post proper notice at its place of employment and that your Petitioner was not aware of any posted notice apprising him of the Acts and of his right to file charges of discrimination against Skyline with the appropriate agency.

CONCLUSION

Wherefore, and for the reasons stated, it is respectfully submitted that the decision by the Court of Appeals below is improper, and presents a new standard that will tend to destroy uniformity, predictability, and stability in summary judgment proceedings under Rule 56 thereby requiring clarification by this Court, and that the present Petition be granted.

Respectfully submitted,

JOHN J. GAYDOS
442 Communicana Building
421 South Second Street
Elkhart, Indiana 46516
(219) 294-1516

Attorney for Petitioner

[6] Posey's complaint, paragraph 7.

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-1580

EDWARD R. POSEY,

Plaintiff-Appellant,

v.

SKYLINE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S 80-0330—**Allen Sharp**, *Judge.*

SUBMITTED JANUARY 24, 1983*—DECIDED MARCH 8, 1983

Before CUDAHY, ESCHBACH, and POSNER, *Circuit Judges.*

ESCHBACH, *Circuit Judge.* Edward R. Posey brought suit against Skyline Corporation, his former employer, for an alleged wrongful discharge in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et*

* After preliminary examination of the briefs, the court notified the parties that it had tentatively decided oral argument was unnecessary. The notice provided that any party could file a "Statement as to Need for Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 14(f). Neither party filed such a statement. Upon consideration of the briefs and the record, the appeal is submitted for decision without oral argument.

seq. The district court granted Skyline's motion for summary judgment on the ground that Posey failed to file a timely charge alleging unlawful discrimination with the EEOC as is required by 29 U.S.C. § 626(d). We affirm.

I.

For the purposes of our review of the district court's entry of summary judgment, we will construe the facts alleged in their light most favorable to Posey. These factual allegations are found in Posey's pleadings and affidavit.

The Skyline Corporation is engaged in the manufacture and sale of mobile and modular homes in Indiana. Edward Posey was hired by Skyline in 1957 and by 1977 he had been promoted to the position of plant manager. On March 1, 1977, Posey sustained a work-related injury which required the surgical replacement of his left hip joint. He returned to work as plant manager on October 1, 1977.

Posey was reinjured on September 5, 1978, and shortly thereafter was granted a medical leave without pay for an indefinite period of time. On October 13, 1978, without any notification, Posey's employment was terminated. Posey began to receive weekly workmen's compensation benefits on that date. These payments continued until April 1980.

On June 4, 1979, Posey approached Skyline officials to inquire about his profit sharing benefits and the possibility of returning to work. In response to the latter inquiry, Posey was told: "Don't you understand? You were terminated on October 13, 1978." Posey replied: "You mean after twenty-two years I was terminated without notice?" Skyline officials, after responding affirmatively, told Posey that he had been terminated because of his age (54) and because of his ill health.

Posey contacted attorney John Gaydos on June 30, 1980, to solicit assistance in acquiring additional workmen's compensation and medical benefits, which had

ceased in April of 1980. Posey alleges that at this time he did not realize that he had a potential cause of action under the Age Discrimination in Employment Act. Posey's attorney contacted the legal department of Skyline on July 3, 1980 to discuss "the termination of Posey." A follow-up letter was sent by Posey's attorney to Skyline on July 14, 1980. Evidently, Gaydos was unable to obtain any further benefits for Posey. With this fact in mind, and with the realization that he would not be rehired by Skyline, Posey reviewed the facts of his termination with his attorney on September 18, 1980. It was at this point, Posey asserts, that he realized for the first time that he had a cause of action based on age discrimination. On October 10, 1980, suit was commenced in district court.

On December 22, 1980, Skyline filed a motion for summary judgment, alleging that Posey failed to file the requisite notice of charge of unlawful discrimination with the EEOC within 180 days of the alleged discrimination. On March 3, 1981, Posey filed the required charge with the EEOC. The district court granted Skyline's motion for summary judgment a week later. This appeal followed.

II.

The Age Discrimination in Employment Act requires in relevant part that:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred;

29 U.S.C. § 626(d)(1). All functions that were vested in the Secretary of Labor pursuant to this Act have been transferred to the Equal Employment Opportunity Commission. *See* 1978 Reorg. Plan No. 1, § 2, 43 F.R. 19807, 92 Stat. 3781. The purposes behind the requirement that

a charge be initially filed with the EEOC prior to the commencement of a lawsuit are: (1) to provide the EEOC with an opportunity to achieve a conciliation of the complaint while the complaint is still fresh, and (2) to give early notice to the employer of a possible lawsuit, thereby promoting the preservation of evidence as well as good faith negotiating on the part of the employer during the conciliation period. *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1261 (10th Cir. 1976), *affirmed per curiam by equally divided court*, 434 U.S. 99 (1977). A lawsuit may be commenced by an aggrieved party only after a charge has been timely filed with the EEOC, thereby insuring that the EEOC is provided with an opportunity to seek a conciliation between the parties.

This Court has held, however, that the 180 day period in which a charge must be filed with the EEOC is not absolute but is subject to equitable modification. *See Kephart v. Institute of Gas Technology*, 581 F.2d 1287, 1289 (7th Cir. 1978), *cert. denied*, 450 U.S. 959 (1981). In *Kephart*, we noted that Congress imposed upon employers the duty to post in a conspicuous place a notice which advises employees of their rights under the Age Discrimination in Employment Act. *Id.* at 1289.[1] This posting of notice requirement was apparently deemed necessary by Congress to guarantee that employees would be fully informed of their rights under the ADEA. *Id.* Accordingly, to insure that employers would not breach the posting requirement without penalty, as well as to effectuate the remedial purposes of the ADEA, we concluded in *Kephart* that the 180 day period in which a charge must be filed with the EEOC was tolled by an employer's failure to post a conspicuous notice of ADEA rights. Specifically,

---

[1] Specifically, section 627 of the Act provides:

> Every employer . . . shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

29 U.S.C. § 627.

we held that if an employer fails to post in a conspicuous manner the required notice of ADEA rights, the 180 day period will not begin to run until the employee either retains an attorney or acquires actual knowledge of his rights under the ADEA. *Id.*

In this case Posey argues that he is entitled to the equitable modifications established by *Kephart*. In order to be so entitled, however, there must exist an issue of fact concerning whether Skyline had conspicuously posted the required notice of ADEA rights. Without such a factual dispute, the 180 day period in which a charge must have been filed with the EEOC would have begun to run at the date of the alleged unlawful discharge, in this case being at best June 4, 1979.

To create a question of fact, an adverse party responding to a properly made and supported summary judgment motion must set forth specific facts showing that there is a genuine issue for trial. *See Macklin v. Butler*, 553 F.2d 525, 528 (7th Cir. 1977); Rule 56(e), Fed. R. Civ. P. A party may not rest on mere allegations or denials of his pleadings; similarly, a bare contention that an issue of fact exists is insufficient to raise a factual issue. *See Shacket v. Philko Aviation, Inc.*, 681 F.2d 506, 513 n.8 (7th Cir. 1982); *Whitfield v. Gangas*, 507 F.2d 880, 882 (10th Cir. 1974). Rule 56 of the Federal Rules of Civil Procedure clearly requires that an adverse party set forth specific facts showing a genuine issue for trial.

As part of its motion for summary judgment, the defendant Skyline Corporation submitted two affidavits to the district court, both averring that Skyline had in fact conspicuously posted the required ADEA notice of rights. The affidavit of Delvin D. Herr, Division Manager of Skyline, stated in pertinent part that:

> "I know, of my own personal knowledge, that from and after February 19, 1977, there was continuously posted in the lunch room of the Skyline plant of which I am Division Manager, a notice of an individual's rights under the Age Discrimination in Em-

> ployment Act. Said notice was conspicuously and continuously posted in the employees' lunch room . . . ."

Robert Szrom, Vice President of Human Resources for Skyline, also averred that:

> "Skyline records indicate that the requisite notice to employees of their rights under the Age Discrimination in Employment Act has been continuously posted in the Skyline plant . . . ."

Submitted with this affidavit was a "true copy" of the notice posted by Skyline, as well as photographs of the lunch room where the ADEA notice was posted.

In response to these affidavits, Posey submitted an affidavit in which he personally averred:

> "That he frequently, i.e., almost every working day, glanced at the posters on the bulletin board in the employees' lunch room adjacent to the plant's production area of the Goshen plant . . . and promptly read any new posted notices, and that he never saw and does not recall ever reading a notice to employees of their rights under the Age Discrimination in Employment Act as stated in the affidavits of Robert F. Szrom and Delvin D. Herr."

Posey submitted no other evidence suggesting that Skyline Corporation failed to comply with the posting of notice requirement.

Applying the previously discussed principles of summary judgment, we must conclude that Posey's statement is insufficient to create a question of fact concerning whether Skyline had conspicuously posted the ADEA notice. The affidavits submitted by Skyline Corporation uncontrovertedly indicate that the company did indeed conspicuously post the requisite notice.[2] Posey's affidavit

---

[2] The notice posted at Skyline stated in part that: "If you wish to file your own suit, you must do so within prescribed time limits. It is important to contact the division promptly." Posey argues that even if the company did post a notice, it was in-

(Footnote continued on following page)

merely indicates that Posey never saw the ADEA notice, which is not the same as an averment that the notice was not in fact conspicuously posted. This is no doubt a very close distinction, but it is one we must draw, especially in light of the strict requirements of Rule 56 of the Federal Rules of Civil Procedure. Although it is true that a court should give to the party opposing a summary judgment motion the benefit of all reasonably drawn inferences, *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), the mere possibility that a factual dispute may exist, without more, is an insufficient basis upon which to justify denial of a motion for summary judgment. *See Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). Posey's affidavit perhaps at best hints that a question of fact may exist in this case. Rule 56, however, demands that Posey show *specific* facts indicating that a genuine issue does indeed exist for trial. This requirement simply had not been met. Neither the district court nor this Court has an obligation to hypothesize or speculate about the various implications of Posey's factual presentation. Unsupported by other evidence, Posey's averment that he never saw an ADEA poster at Skyline fails to go far enough to rebut Skyline's unambiguous affidavits.

As such, the 180 day period mandated by § 626(d)(1) began to run at best no later than June 4, 1979, which is

---

[2] *continued*
adequate to inform him of the 180 day charge requirement. In support of this contention, he refers to several more recent Department of Labor ADEA posters in which the time requirements of 29 U.S.C. § 626(d) were specifically delineated. We disagree with this contention. Section 627 clearly indicates that the content of the ADEA posters is a matter for the Secretary's discretion. The fact that the Secretary later chose to spell out the time requirements of 29 U.S.C. § 626(d) in a more elaborate fashion in no way detracts from the validity of the earlier poster. The notice posted at Skyline was prepared by the Department of Labor and, moreover, made it clear that some time constraints did in fact exist. Posey's argument regarding the adequacy of the ADEA poster must accordingly fail.

the date Posey claims he discovered he had been discharged. Posey's charge of unlawful discrimination was not filed until March 2, 1981, well beyond the 180 day limit. This filing obviously failed to satisfy the requirements of section 626(d)(1).

III.

The procedural requirements for commencing an action under the ADEA are clear. There is no question, either of law or fact, that Posey failed to comply with the statutory requirements of section 626(d). Accordingly, the order and judgment of the district court is

AFFIRMED.

CUDAHY, *Circuit Judge*, dissenting.

I cannot agree that Posey's affidavit fails to state *specific facts*. It is quite specific as to the regularity of his perusal of the bulletin board and as to his practice of promptly reading new notices. It is also quite specific about what he did not see or recall reading. Its only deficiency, if there is one, is in its failure to make explicit the obvious inference to be drawn from the facts set forth, namely that no ADEA notice was posted. Presumably, if Posey had added the statement "Therefore, the ADEA notice described in the affidavits of Szrom and Herr was not posted" to his affidavit quoted by the majority, the issue of material fact would have been indisputably drawn. The majority is applying a rigid common-law pleading approach to summary judgment practice which seems to me manifestly inconsistent with the spirit of the Federal Rules.

Posey "should be given the benefit of all inferences reasonably deducible from the evidence." *Federal Procedure*, L.Ed. § 62:546 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Here the majority is simply determining that Szrom and Herr are more credible than

Posey. This is a determination which we are not at liberty to make on summary judgment. *See Federal Procedure* § 62:547. Further discovery might eliminate the issue of fact as to posting of the notice without need for trial. However, I do not believe we are free to take impermissible liberties with these quite conflicting affidavits as a short cut to disposition of this case.

I therefore respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 4, 1983.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*

No. 81-1580

EDWARD R. POSEY,

Plaintiff-Appellant,

v.

SKYLINE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S 80-0330—**Allen Sharp**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and the majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

No. S 80-330
EDWARD R. POSEY,

Plaintiff,

v.

SKYLINE CORPORATION,

Defendant.

MEMORANDUM AND ORDER
[Entered March 10, 1981]

The Court takes up defendant's Motion for Summary Judgment filed December 22, 1980.

As recited in plaintiff's affidavit at paragraph 19, page 4, he employed counsel April 7, 1980, for the purpose of determining the availability of medical benefits under a group insurance policy of Skyline Corporation and to ascertain if additional workmen's compensation benefits were available. Obviously, this employment was in specific connection with matters arising from his employment relationship with Skyline Corporation. The controlling case of *Kephart v. Institute of Gas Technology*, 581 F. 2d 1287 (7th Cir. 1978), approves the doctrine of equitable tolling in the following instance.

> It is our conclusion, therefore, that the 180 day notice limitation of §626(d) is tolled by the employer's failure to post conspicuously notice of

> ADEA rights, and that in such circumstances, *the 180 day period will begin to run when the employee either retains an attorney or requires actual knowledge of his rights under the ADEA.* (emphasis added). *Kephart v. Institute of Gas Technology, supra,* at 1289.

Plaintiff's own affidavit discloses that he had employed counsel more than 180 days prior to his counsel's letter of March 3, 1981. Even if this initial contact with counsel is found to be insufficient to come within the purview of the aforecited *Kephart* holding, the 180 day period must be found to have commenced at least July 3, 1980. That date is recited in counsel for plaintiff's July 14 letter as the date of a telephone conversation with Mr. John R. Lutz of Skyline Corporation "regarding termination of Edward R. Posey . . ." As stated in *Kephart v. Institute of Gas Technology, supra,* the 180 day period begins to run from the time counsel is consulted or from the time that the claimant is actually aware of rights under ADEA. The use by the Seventh Circuit Court of Appeals of the disjunctive "or" makes it clear that the earliest of either event commences running of the 180 day notice of charge.

The two events, i.e., actual awareness of ADEA rights or employment of counsel, was apparently adopted by the Seventh Circuit from *Edwards v. Keiser Aluminum & Chemical Sales, Inc.,* 515 F. 2d 1195 (5th Cir. 1975). In *Edwards,* the Fifth Circuit Court of Appeals expressly declined to determine if equitable tolling could occur, but, with respect to the employment of counsel issue, stated at 1200, footnote 8:

> We feel constrained to note that, even if the 180 day period could be waived, this is a singularly inappropriate situation for such a remedy, in view of the fact that Edwards consulted an attorney long before the 180 day period ran. *In such a circumstance, he had the "means of knowledge" of his ADEA rights, for the very purpose of consulting an attorney was to ascertain what legal redress arises out of a factual situation encompassing a supposed wrong.* While it may be inequitable to allow an employer to benefit

> from his own wrong, it would be at least equally unfair to then hold that the employer is estopped from raising the 180 day bar where the injured *employee consulted an attorney who either slept on his client's rights or did not believe he had any under the statute.* (emphasis added)

In addition to *Kephart v. Institute of Gas Technology, supra*, plaintiff's counsel cites *Dartt v. Shell Oil Company*, 539 F. 2d 1256 (10th Cir, 1976), *Coke, Jr. v. General Adjustment Bureau, Inc.*, 616 F. 2d 785 (5th Cir, 1980), *Bonham v. Dresser Industries, Inc.*, 569 F. 2d 187 (3d Cir. 1978), and *Gabriele v. Chrysler Corporation*, 573 F. 2d 949 (6th Cir. 1978), in support of his contention that the doctrine of equitable tolling should excuse plaintiff's failure to comply with the 180 day period requirement. A brief review of the factual situation in these cases makes them clearly distinguishable from this case and enlightening on the issue of equitable estoppel.

Gabriele v. Chrysler Corporation, supra, was not concerned with the doctrine of equitable estoppel but disposed of the issue of whether or not a claimant was required to file first with an appropriate state agency, if such existed in the particular state. The Tenth Circuit Court of Appeals in *Dartt v. Shell Oil Company, supra*, found that the claimant who filed her notice of charge 36 days after the 180 day period expired was excused from timely compliance on the following set of facts: Claimant was discharged July 31, 1973 and at the suggestion of an attorney, contacted the Federal Wage and Hour Division and met with a representative of that agency on August 9, 1973; the representative periodically met with representatives of Shell Oil Company and finally determined that conciliation would not occur at which point the representative on March 5, 1974 so advised claimant and enclosed literature regarding ADEA which for the first time disclosed to claimant the 180 day limit; plaintiff then contacted a new attorney who mailed the required notice on March 4, 1974, 38 days after the 180 day period had expired. The court, at page 1262, on the issue of equitable tolling, stated:

> We cannot fault *Dartt* in her efforts to present her cause. She twice promptly sought private legal advice and twice promptly followed that advice. Short of anticipating an administrative derlection by the Wage and Hour Division, despite her prodding of that agency, it was not to be expected that lapse of time would void her cause. This is not a case of a Plaintiff sleeping on her rights nor a Defendant in any way prejudiced thereby either presumptively or in fact.

The Fifth Circuit Court of Appeals in *Coke v. General Adjustment Bureau, Inc., supra*, found that an employee demoted May 1, 1976, who filed his notice on December 29, 1976, could establish timely compliance if, at trial, the plaintiff proved that his employer represented that he would be reinstated and that he justifiably relied upon such representations. It should be noted that in *Coke*, the notice was filed approximately 60 days after the 180 day period had expired. It should further be noted that Coke continued to work for the employer at the lesser position and would thus have some reason to believe, for a short period of time, that his situation would be reversed.

The Third Circuit Court of Appeals in *Bonham v. Dresser Industries, Inc., supra*, held that notice filed July 16, 1976, after an employee was discharged October 31, 1975, could be considered timely since the employee was paid through December 31, 1975, and received a positive response from his former employer in January 1976, regarding the availability of another position for which he was subsequently not hired. With these facts, the court was of the opinion that the employee could believe that his discharge was not final until December 31, 1975, in which event the employee complied with the requisite 180 day filing period or that the positive letter from his former employer in January 1976 could extend the 180 day period an additional 30 days. *Bonham*, at page 192, does have an appropriate comment on this case:

> The 180 day period does not begin to run until the employee knows, or as a reasonable person should

> know, that the employer has made a final decision to terminate him, and the employee ceases to render further services to the employer.

It is difficult to imagine a reasonable person being unaware of his termination when, as plaintiff in this case states (paragraph 8, page 2, of his affidavit) he was told by Mr. Bland of Skyline Corporation on June 4, 1979, "Don't you understand you were terminated on October 13, 1978, when Skyline stopped paying you your salary?" Plaintiff responded "You mean after 22 years of service I was terminated without notice?", and Mr. Bland then stated "Yes". The word "termination" used by plaintiff is a verbatim recollection of the conversation with Mr. Bland and it admits of no other construction than that the employment relationship is finished. From June 4, 1979 plaintiff slept on his rights until the following April 1980 when he consulted counsel who apparently was unaware of his client's rights until March 3, 1981, when he wrote to the EEOC regarding plaintiff's claim. This letter is dated more than two months after plaintiff's counsel was specifically advised of the appropriate federal agency and applicable time limits.

Plaintiff fares no better with his vague statement that he did not know that withdrawing his pension or profit-sharing benefits resulted in his termination with Skyline Corporation in view of his counsel's October 2 letter to John R. Lutz of Skyline Corporation and in which plaintiff's counsel states:

> I do, however, want to state that it is my understanding that Mr. Posey did not quit, but that his employment was terminated by Skyline on or about October 13, 1978, and that he was not informed of such termination until 8 months later when he intended to return to work, at which time he was informed by Mr. Bland that he was terminated on or about October 13, 1978. *In order for Mr. Posey to obtain his funds in the profit sharing plan, it was necessary that he execute papers terminating his employment with Skyline.* (emphasis added)

The plaintiff has failed to comply with the requirements of 29 U.S.C. 626(d).

Plaintiff's reliance upon 42 U.S.C. § 1981 is misplaced. That section, part of the Civil Rights Act of 1866, provides:

> All persons within the jurisdiction of the United States shall have the same rights in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

It is clear that § 1981 addresses only claims of racial discrimination, *Runyon c. McCrary*, 427 U.S. 160, 96 S. Ct. 2587, 49 L. Ed. 2d 415 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975). In *Runyon, supra*, the Supreme Court considered a class action under § 1981 by Negro children alleging that a private school had failed to admit them on the basis of racial discrimination. Justice Stewart, at 427 U.S. 167, 168 [49 L. Ed. 2d 422, 423] set forth the issue not involved under this congressional statute, stating:

> It is worth noting at the outset that some of the questions that these cases do not present . . . they do not present any question of a right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith *since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity* . . . .
>
> *It is now well established that § 2 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981, prohibits racial discrimination in the making and enforcement of private contracts.* See *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-460; *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431, 439-440. Cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-443, n. 78 (emphasis added)

In this case there is no allegation that plaintiff was discriminated against on the basis of his race.

The plaintiff has failed, as a matter of law, to state a claim upon which relief can be granted. Defendant's Motion for Summary Judgment is GRANTED. Judgment shall enter accordingly.

Enter March 10, 1981.

/s/ Allen Sharp
Judge
United States District Court

cc: Gaydos
Parker
Calendars

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil No. S-80-330
EDWARD R. POSEY,

Plaintiff,

v.

SKYLINE CORPORATION,

Defendant.

FINDINGS OF FACT AND JUDGMENT OF THE COURT
[Entered March 10, 1981]

Skyline Corporation, Defendant in the above entitled action, having filed its Motion for Summary Judgment together with supporting affidavits and exhibits and having submitted its Memorandum in Support of said motion, and this Court having held a hearing on said motion pursuant to FRCP 56, now makes the following findings of fact:

1. Plaintiff alleges that Skyline Corporation discriminated against him because of his age and Plaintiff is within that category of persons aged 40 to 70.

2. Skyline Corporation, at all times material and from at least August, 1976, has complied with 29 U.S.C. §627 in that it posted in the Goshen plant at which Plaintiff was employed, the notice of rights under the Age Discrimination in Employment Act.

3. Skyline Corporation posted the notice near the exit from the lunchroom of the Goshen facility used by employees, which place is now found by the Court to be conspicuous.

4. The Plaintiff, from time to time, was physically present in the employees' lunchroom where the Age Discrimination in Employment Act notice was posted and had the opportunity to observe said notice.

5. Plaintiff did not file a charge with the Equal Employment Opportunity Commission within 300 days of that date on which the alleged discrimination occurred nor has Plaintiff ever filed a charge with the Equal Employment Opportunity Commission at least 60 days prior to instituting the instant action.

6. Plaintiff does not allege that his race was a factor in the alleged discrimination and his race was not a factor in the severance of his employment relationship with Skyline Corporation.

Based upon the foregoing findings of fact, the Court now concludes that the law is with Skyline Corporation, that there is no material issue of fact and that Skyline Corporation is entitled to judgment, as a matter of law, and the Court specifically makes the following conclusions of law:

(a) 29 U.S.C. §626(d) requires Plaintiff to file a charge with the Equal Employment Opportunity Commission alleging discrimination on the basis of age not later than 300 days of the date on which the alleged discrimination occurred.

(b) Plaintiff is required to file a charge with the Equal Employment Opportunity Commission not less than 60 days prior to instituting his complaint for relief under the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.*

(c) Skyline Corporation has complied with the provisions of 29 U.S.C. §627.

(d) The express requirements of 29 U.S.C. §626(d) are not equitably tolled in this case.

(e) The provisions of 42 U.S.C. §1981 are not applicable to this case.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that judgment be entered against the Plaintiff and in favor of Skyline Corporation and that the cost of this action be taxed and assessed against Plaintiff, Edward R. Posey.

ENTERED this 10 day of March, 1981.

/s/ Allen Sharp
Judge
United States District Court

cc: Gaydos, Parker, Cals